In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1513

AERO ENGINEERING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. On August 8 or 9, 1967, the Union exhibited to the Company a "batch" of authorization cards claiming that they were signed by a majority of the Company's production and maintenance employees (A. 3, 30).[1] On August 10 and again on September 11, the Company—without requiring that the cards be checked against a payroll list—signed agreements granting the Union recognition as the sole collective bargaining agent for these employees. The Union then requested that bargaining commence (Pet. App. 1a-2a; A. 3, 20-21, 30-31, 37).

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[1] "A." references are to the appendix to the briefs in the court below which we are lodging herewith.

On January 23, 1968, the Union filed unfair labor practice charges with the Board alleging that the Company was refusing to bargain (Pet. App. 2a; A. 3, 22, 74). On February 21, following an investigation of this charge, the Company and Union, with the approval of the Board's Regional Director, entered into a "Settlement Agreement" whereby the Company acknowledged the Union's status as the representative of its production and maintenance employees and agreed to bargain with it for a contract covering that unit (Pet. App. 2a; A. 23, 74). The Company and Union met in bargaining sessions on March 6, 21, 27, and again on May 29 and July 8, 1968 (Pet. App. 2a; A. 3, 22, 31, 74, 84). On August 5, 1968, the Company for the first time questioned whether the Union had represented a majority of the employees when it was extended recognition about a year before and on this basis broke off further negotiations (Pet. App. 2a; A. 46).

The Union thereupon filed additional unfair labor practice charges with the Board. The Board, affirming the Trial Examiner,[2] found that the Company's with-

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[2] Before the Trial Examiner, counsel for the employer sought to examine the authorization cards and elicit evidence, admittedly "searching for facts" that the Union did not have a majority in August or September 1967 (see A. 37, 48-49). In view of the fact that the Company had signed recognition agreements in August and September 1967, had entered into the settlement agreement in February 1968 and had bargained up until July 1968, the Trial Examiner denied the request deeming it a "fishing expedition." The Examiner further pointed out "that it is clear that when the Company recognized the Union, it did not doubt and had no basis for doubting a majority" (A. 52; see also A. 6-7).

drawal of recognition violated Section 8(a)(5) and (1) of the Act (Pet. App. 1a-4a). It rejected the Company's contention that the General Counsel of the Board was required affirmatively to demonstrate the Union's majority "either at the time of the original recognition on September 11, 1967, or as of the refusal to bargain on August 5, 1968" (Pet. App. 2a-3a). In the circumstances, the Board held that to permit the Company to raise the question of majority status "would be an unstabilizing factor in bargaining, would unnecessarily undermine the settlement agreement previously reached, and would constitute an inducement to 'gamesmanship' which would not effectuate the policies of the Act" (Pet. App. 3a). It further held (*ibid.*):

> * * * that by Respondent's recognition of the Union, its execution of a settlement agreement in which it agreed to bargain with the Union, and its subsequent actual bargaining with the Union, that the Union has established a presumption of majority. Respondent did not rebut that presumption. * * *

The Board ordered the Company, *inter alia,* to bargain with the Union (A. 8). Finding "substantial evidence on the record as a whole to sustain the Board's findings," the court of appeals in a *per curiam* opinion enforced the Board's order (Pet. App. 5a).

2. The Board correctly concluded that on the facts of this case the Union was the incumbent bargaining representative whose majority status was properly

presumed, and that the employer failed to rebut that presumption. See *Brooks* v. *National Labor Relations Board*, 348 U.S. 96. The court below found substantial evidence in support of this finding and further review is accordingly unwarranted.

Petitioner's contention (Pet. 4-9) that the decision below is contrary to *International Ladies' Garment Workers' Union (Bernhard-Altmann)* v. *National Labor Relations Board*, 366 U.S. 731, is wide of the mark. In *Bernhard-Altmann*, unlike the situation here, the employer had not entered into a settlement agreement approved by the Board's Regional Director, which acknowledged the Union's majority status and its obligation to bargain with it. Recognizing the importance of settlement agreements in the administration of the Act, the Board here properly refused to allow the employer to engage in a broad-ranging attempt to search for evidence (which it otherwise did not have) to challenge the majority status prior to the settlement agreement. See *W. B. Johnston Grain Co.* v. *National Labor Relations Board*, 365 F. 2d 582, 587 (C.A. 10); *Pool Foundry and Machine Co.* v. *National Labor Relations Board*, 192 F. 2d 740, 743 (C.A. 4), certiorari denied, 342 U.S. 954; cf. *Wallace Corp.* v. *National Labor Relations Board*, 323 U.S. 248, 254-255. Indeed, the employer admittedly had no evidence to show lack of majority status either prior to the settlement agreement or thereafter (see Pet. App. 3a). The Company, after it has fully complied with the Board's order, may absent a contract, withdraw recognition from the Union if it has a rational basis for

doubting the Union's continued majority status. *National Labor Relations Board* v. *Gulfmont Hotel Co.*, 362 F. 2d 588, 589 (C.A. 5).[3]

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel.

APRIL 1971.

[3] By the same token, at an appropriate time, the employees may, if they desire, petition the Board for an election. See *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702, 705-706.

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